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**IN THE
COURT OF APPEALS OF INDIANA**

KENT WEBER,

Appellant,

vs.

MICHELE M. WEBER,

Appellee.

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No. 70A01-0608-CV-357

APPEAL FROM THE RUSH SUPERIOR COURT
The Honorable Daniel Lee Pflum, Special Judge
Cause No. 70D01-0402-DR-12

April 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Kent Weber (“Father”) appeals the trial court’s order in the dissolution of his marriage to Michele M. Weber (“Mother”).

We affirm.

ISSUES

1. Whether the trial court erred when it awarded custody of the parties’ minor children, T. and B., to Mother.
2. Whether the trial court erred when it ordered Father to pay a portion of the attorney fees incurred by Mother.

FACTS

Father and Mother married September 2, 1989. Their daughter T. was born December 7, 1992, and their son B. was born April 1, 1996. In March of 2003, the parties bought an ambulance service business. Less than a year later, in early 2004, the business was failing. The parties were behind on their mortgage, and all of their utilities were in danger of being shut off.

On February 5, 2004, Father moved out of the marital residence. On February 11, 2004, Mother filed a petition for dissolution of the marriage. On April 19, 2004, a preliminary provisional order granted Mother custody of the children and possession of the marital residence in Carthage, and ordered Father to pay \$113 per week for child support.

In the meantime, in early March, Father had moved with his girlfriend, Angel, to North Carolina to seek employment. Father began work in North Carolina in mid-March, 2004. At a hearing on May 24, 2004, Mother testified that Father had provided no funds

for support of the children since leaving the marital residence and had failed to pay child support as ordered. On June 3, 2004, the trial court reaffirmed its order for Father to make child support payments of \$113.00 weekly.

Mother's parents paid to bring the utility payments current for the marital residence and helped her buy groceries. Mother attempted to operate the business to support herself and the children. In late June of 2004, Father and his girlfriend moved back to Indiana. In late July, Mother filed a citation for contempt, alleging that Father had still not paid any child support.

On September 3, 2004, upon motion from Father,¹ the trial court ordered that T. and B. commence counseling with Cindy Harcourt of Harcourt Counseling Services in Rushville, with payments to be shared by the parents. Mother's attempts to continue the operation of the ambulance service failed; faced with insuperable debts, she declared bankruptcy.

In November of 2004, Mother began work at Rush Memorial Hospital in Rushville. When the children would arrive home from school, Mother's parents were at her Carthage home to care for them until her return. Mother made \$9.50 per hour, taking home \$126 weekly after deductions – which included \$137.50 weekly for health insurance coverage for the children.

¹ The motion is not included in Father's Appendix.

On December 21, 2004, on motion from Father,² the trial court appointed Brenda Wilhelm-Waggoner as guardian *ad litem* (“GAL”) for the children. On February 3, 2005, Mother took children to Harcourt for counseling. Mother took them to four subsequent counseling sessions.

In the meantime, Father, Angel, and her three-year-old son began living in a three-bedroom trailer in Rushville, purchased for them by his parents. Father and Angel did not pay them “a set amount” to live there but “whatever” they could. (Tr. 236). In early 2005, Father began working for a local trucking business, earning \$350 - \$370 weekly.

Foreclosure proceedings on the marital residence had proceeded to the point where Mother was ordered to vacate by March 15, 2005. She moved to a nearby two-bedroom apartment, costing \$395 per month. Her parents continued to provide after-school care for the children. After Mother had taken children to five counseling sessions, Father began taking them.

In June of 2005, Mother lost her job at Rush Memorial Hospital, due to downsizing. She called Harcourt to advise that the children would not be able to continue counseling because she no longer had insurance coverage. Mother was unable to find new employment until September of 2005, when she began working at Fayette Memorial Hospital in Connersville. Mother earned \$9.50 per hour there, and had premiums for the children’s health insurance coverage deducted from her earnings.

² This motion is also not in the Appendix.

On November 17, 2005, the trial court issued a summary dissolution of the marriage, reserving the issues of custody, child support, and related matters.

In early 2006, Father began driving an over-the-road truck for another company, earning \$800 per week. On February 18, 2006, Father married Angel. Angel commuted to work in Indianapolis, leaving their residence between 6:30 and 7:00 a.m. to be at work at 8:30 a.m., and left work at 4:30 p.m. to return home.

On March 21, 2006, the trial court heard evidence on issues as to the children. Father testified that when he was in North Carolina, Mother had barred his communication with the children. Mother denied Father's charge and testified that she had permitted his communication with the children.³ Father admitted that he had never provided health insurance coverage for the children. At the March 2005 hearing, Father's counsel had stipulated that Father had three counts of "criminal charges concerning some of the tax obligations" of the ambulance service business pending against him, (Tr. 52); at the final hearing a year later, his counsel stipulated that Father had been "convicted of two counts of D felony failure to remit tax trust money." (Tr. 315). Father testified that he would be on probation for the next three and one-half years. Finally, Father testified that over the six months before the final hearing, he had sought custody of T. only – with the intention of agreeing to Mother's custody of their son B. However, at the final hearing, he had "decided since we're setting [sic] here that [he] want[ed] full custody of [both] kids." (Tr. 308).

³ At the May 24, 2004 hearing, Mother had admitted that for a short period of time in 2004, she had not allowed the children to talk to Father when he telephoned.

The children had attended counseling sessions with Cindy Harcourt, a licensed clinical therapist. Harcourt, the GAL, Mother, and Father all testified that the counseling had benefited the children. Harcourt testified that it concerned her when Mother stopped the children's attendance after her insurance coverage ended in June of 2005. However, her counseling with the children had resumed and was ongoing at the time of the final hearing. Harcourt informed the trial court that she had no recommendation regarding custody of the children and no opinion "as to which parent would better provide structure, supervision, and nurturing." (Tr. 139). The GAL testified that initially, Mother had expressed substantial anger toward Father in the spring of 2004, but by late 2005, the parents were communicating well. The GAL recommended that parents be granted joint custody if the trial court found them "able to communicate and have joint custody." (Tr. 234). If this were not the case, the GAL believed that "T[.]'s best interest would definitely be served by [Father] having primary custody of her," but that the children should "absolutely" not be placed in separate homes. (Tr. 232).

Neither party requested that the trial court issue findings of fact and conclusions of law pursuant to Indiana Trial Rule 52(A). On June 20, 2006, the trial court issued its order awarding physical custody of the children to Mother. It further ordered that Father pay \$1,500.00 of the nearly \$3,500.00 in attorney fees Mother had incurred.

DECISION

1. Child Custody Determination

We begin with the premise that the trial court is in a better position than we are to render a decision on the merits concerning child custody. *See Stratton v. Stratton*, 834

N.E.2d 1146, 1151 (Ind. Ct. App. 2005); *see also Pawlik v. Pawlik*, 823 N.E.2d 328, 329 (Ind. Ct. App. 2005). This is because the trial court is able to observe the parties' conduct and demeanor and listen to their testimony. *Id.* Therefore, we will reverse a custody determination only if it is clearly against the logic and effect of the facts and circumstances before the trial court or the reasonable inferences drawn therefrom. *Stratton* at 1151, *Pawlik* at 330. Moreover, child custody determinations fall within the sound discretion of the trial court, and the trial court's determination will not be disturbed on appeal absent a showing of abuse of that discretion. *Francies v. Francies*, 759 N.E.2d 1106, 1115-16 (Ind. Ct. App. 2001), *trans. denied*. Further, we will neither reweigh evidence, nor reassess witness credibility, nor substitute our judgment for that of the trial court. *Id.*

The trial court *sua sponte* entered findings of fact and conclusions of law. In such cases, the specific findings control only as to the issues they cover, while a general judgment standard applies to any issues upon which the court has not found. *Harris v. Harris*, 800 N.E.2d 930, 934 (Ind. Ct. App. 2003), *trans. denied*. Our review applies a two tiered standard. *Id.* at 935. First, we determine whether the evidence supports the findings; second, whether the findings support the judgment. *Id.*

a. Findings

Father asserts the custody award is erroneous because the evidence does not support various trial court findings. He first challenges the trial court's finding that he had failed to pay support as ordered and that his payments were erratic. At earlier hearings, Father admitted that he initially failed to pay support as ordered and that some

payments were late. The fact that at the time of the final hearing Father was current in his child support payments does not render the challenged finding unsupported.

Father next asserts that the evidence fails to support the trial court's finding that the parents' work-related absences from home were similar but that Father "may not be home two nights per week." (App. 46). Mother testified that she works during the day and is home in the evening. Father's wife Angel testified that in his new job, Father worked five days a week. Father testified "that he was home every night last week," was "out one night" the week before, and that this "couple of weeks" was "pretty light." (Tr. 303). This testimony supports the reasonable inference that Father "may not be home two nights per week." (App. 46) (emphasis added). Therefore, the finding is not unsupported by the evidence.

Father directs us to the finding that states the GAL's report did not address Father's "present living conditions" and "ignore[d] the position of the maternal grandfather." (App. 46). Father asserts that there was "no concern about Father's home . . . reported to the GAL" that would make it unsuitable for the children, and the trial court heard evidence of the maternal grandfather's assistance with the children at Mother's residence after school. Father's Br. at 13. However, the contents of the GAL's report support the trial court's finding that certain things were not addressed in the report. Moreover, we do not find that the substance of this finding regarding Father's present living conditions is dispositive of the trial court's custody determination.

Father also cites to the trial court's finding that the GAL had recommended shared custody if the trial court determined "that they can cooperate and communicate regarding

[the minor children], which the Court so determines.” (App. 46). Father argues that no evidence supports this finding. We do find the contents of this finding somewhat cryptic. Nevertheless, we do not find its substance to be critical in the trial court’s ultimate determination that primary physical custody of the children should be awarded to Mother.

Next, Father directs us to the trial court’s order regarding the amount of child support he should pay. He argues that conflicting evidence makes it impossible “to know on what it based Father’s child support obligation.”⁴ Father’s Br. at 14. However, Father is not appealing the trial court’s order as to the amount of child support. Therefore, this specific finding does not control our review in reaching a determination of whether the trial court abused its discretion in making the child custody determination. *See Harris*, 800 N.E.2d at 934.

Father also contends that the finding as to the parents’ respective payments of uninsured health care expenses is not supported by the evidence. As noted above, because Father’s appeal does not challenge the order in this regard, this contention is also unavailing.

Finally, Father challenges the trial court’s finding that when Father left Indiana, Mother “was left with a bankrupted [sic] ambulance business with several employees. Despite her efforts to save the bankrupt business, the same was closed and [Mother] was

⁴ Father directs us to the trial court’s inquiry, “Your [sic] not making \$300 a week? \$800.00 a week?” (Tr. 327). To which he answered, “Yes, as long as I don’t miss work that is correct.” *Id.* He posits that this either indicates that he is “making \$300.00 per week or \$800.00 per week.” Father’s Br. at 14. However, earlier he had testified that missing work for the day that he came to court for the final hearing “cost [him] \$160.00,” which supports the reasonable inference that his pay was \$800 weekly (5 X 160 = 800). (Tr. 304). Further, Father’s wife Angel testified that in the new truck-driving job, Father was earning a salary of \$800 gross working five days a week.

forced to file bankruptcy.” (App. 47). The evidence did establish that that the parties had bought the business and relied on it for income; that the business failed; that Mother was left without income until finding employment nine months after Father moved from the marital residence; that he left owing substantial marital bills; and that Mother filed bankruptcy. With respect to any technical deficiencies in the trial court’s finding, as in the two previously argued by Father, this one is not critical to the child custody determination either.

b. Judgment

Father argues that the trial court findings that are supported by the evidence do not support its judgment awarding custody to Mother. Specifically, he cites to the findings that B. had decreasingly resorted to seeking comfort in Mother’s bed; that Mother’s work schedule kept her away from home until dinnertime on weeknights; that Mother’s parents assisted with care of the children; that certain feelings of T. as to Mother still needed to be addressed by counseling with Harcourt; and that the relationship between T. and Mother was improving. In addition to the preceding, Father cites to the actual paragraph wherein the trial court awarded physical custody to Mother while also stating that if she “continue[d] to engage in activities discussed at the hearing, the Court will seriously consider changing custody to [Father]” as being inconsistent. (App. 46). According to Father, the foregoing effectively finds that B. still shares Mother’s bed; that Mother is absent “every evening until dinner time”; that Mother leaves the children “primarily in the care of her parents”; that T. continues to have negative feelings about Mother; that Mother and T. still have problems; and that Mother “had conducted herself in such a way

that, if continued, Father would likely win custody”. Father’s Br. at 16. We do not agree. The trial court considered substantial but sometimes conflicting evidence regarding the above before making its final custody determination and, acting within its discretion, it determined that the positive inferences of the evidence presented warranted an award of primary physical custody to Mother. We hold that the evidence does support the trial court’s judgments, and the collective findings do not, as argued by Father, render its judgment an abuse of discretion. *See Francies*, 759 N.E.2d at 1116.

c. “Undisputed Evidence”

Father also argues that the trial court ignored “undisputed evidence which clearly supported awarding custody of the children to Father.” Father’s Br. at 16. Father’s argument essentially asks that we reweigh the evidence, and this we do not do. *See Francies*, 759 N.E.2d at 1116. Father cites to the evidence before the trial court that Mother had engaged in some form of sexual communication with men on the internet; however, there was no evidence that the children had been exposed to this communication. The trial court heard testimony that Mother took the children to counseling with Harcourt and only stopped when she lost her job and her health insurance coverage was terminated. There was also testimony that Father had no health insurance coverage for the counseling. The trial court heard testimony regarding Mother’s work hours; the distances between her home, her employment, Harcourt’s office, and the GAL’s office; her limited income; and the financial and childcare assistance that her parents had provided. It also heard testimony concerning Father’s efforts for six months before the final hearing to obtain custody of T. only, and that at the final hearing he

decided that he wanted custody of both children. Mother described her strong relationship with and commitment to both children. The trial court did not abuse its discretion by awarding primary custody of both children to Mother.

d. Other Arguments

Father cites *Hughes v. Rogusta*, 830 N.E.2d 898 (Ind. Ct. App. 2005), wherein we affirmed the trial court's award of the parties' child to the father. In *Hughes*, the mother challenged various findings made by the trial court pursuant to her request for findings of fact and conclusions of law. We concluded that the evidence supported the trial court's findings and its judgment awarding custody to the father. *Hughes* addressed the specific facts and circumstances presented in that case, and we do not find our holding in *Hughes* to render the trial court's custody determination in this case to be an abuse of discretion.

Father also cites *Pryor v. Pryor*, 714 N.E.2d 743 (Ind. Ct. App. 1999), and suggests that the trial court "should focus on the effect of either parent's conduct on the children, rather than focusing on the conduct itself." Father's Br. at 20. Father then cites various testimony concerning Mother's feelings and actions that he claims "adversely affected the children." *Id.* He then cites to evidence that he claims indicates that his "conduct had positively affected" the children. *Id.* Again, this argument asks that we reweigh the evidence, which we do not do. *See Francies*, 759 N.E.2d at 1116.

Finally, Father cites *Maloblocki v. Maloblocki*, 646 N.E.2d 358 (Ind. Ct. App. 1995), noting that

evidence showed that the mother discouraged the child from visiting his father, made disparaging remarks about the father to the child, and had an erratic work schedule requiring the frequent use of third party care

providers, and where the father's work schedule allowed him to be available to care for the child in the evenings and on weekends and had already arranged for care during the day in the event he was awarded custody.

Father's Br. at 21. In *Maloblocki*, the trial court had awarded custody to the father, and we affirmed that award. Again, *Maloblocki* was based upon evidence presented to that trial court; findings were made pursuant to Trial Rule 52; the evidence supported those findings; and we concluded that the trial court did not abuse its discretion when it awarded custody to the father. 646 N.E.2d at 362.

Father has failed to demonstrate that the custody determination in this case was clearly against the facts and circumstances before the trial court. See *Stratton*, 834 N.E.2d at 1151, *Pawlik*, 823 N.E.2d at 329-30. Therefore, we find no abuse of discretion here.

2. Attorney Fees

Father correctly notes that the award of attorney fees in such a matter is a matter within the trial court's discretion. See *Balicki v. Balicki*, 837 N.E.2d 532, 542 (Ind. Ct. App. 2005) (reverse the award of attorney fees in a dissolution action "only for an abuse of discretion"), *trans. denied*. When deciding whether to make such an award, courts should consider the parties' relative resources, their ability to engage in gainful employment, and their ability to earn an adequate income. *Id.* at 543.

Father argues that the trial court erred when it ordered him to pay \$1,500.00 of the attorney fees incurred by Mother. He notes that the specific order in that regard is as follows:

Evidence was introduced as to the attorney fees incurred by [Mother] to the date of hearing of which attorney fees are in the sum of \$2,005.00 plus time spent for trial preparation and in Court on the date of hearing in the sum of \$1,487.50. However, [Mother] refused to enter into any negotiations with [Father] despite his three requests. [Father] shall pay \$1,500.00 of [Mother's] attorney fees.

(App. 48). Father asserts that the order that he pay any attorney fees is unwarranted inasmuch as the trial court found “that Mother refused to even come to the table as far as negotiating a settlement as opposed to litigating all issues, despite Father’s three requests.” Father’s Br. at 23.

As to the trial court’s finding that Mother had not responded to Father’s proposals, testimony indicated that the dispute concerned Father’s desire to have custody of T. and his willingness to agree to Mother’s custody of B. However, the evidence before the trial court was that Mother had always sought custody of both children. Thus, as Mother responds, there was “nothing to discuss or negotiate concerning custody.” Mother’s Br. at 25.

At the time of the final hearing, Father’s income was \$800 per week; Mother earned \$9.50 hourly for a forty-hour week, or \$380. Moreover, the trial court did not order Father to pay all of the attorney fees of almost \$3,500.00 incurred by Mother but only to pay \$1,500.00 toward her fees. We find no abuse of discretion here.

Affirmed.

BAKER, C.J., and ROBB, J., concur.